Workers Compensation Fund ("WCF") and Fremont Insurance Group, workers' compensation insurance carriers at different times for the Buehner companies, ask the Utah Labor Commission to review Administrative Law Judge Hann's award of benefits to S. H. B. under the Utah Occupational Disease Act ("the Act"; Title 34A, Chapter 3, Utah Code Ann.).

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. '63-46b-12, Utah Code Ann. '34A-2-801(3) and Utah Admin. Code R602-2-1.M.

BACKGROUND AND ISSUE PRESENTED

Mr. B. suffers from silicosis,[1] caused by exposure to silica dust. He filed applications for hearing during February and March 2002 to compel Buehner and two of its insurance carriers, WCF and Fremont, to pay occupational disease benefits for his illness. On May 20, 2003, Judge Hann held an evidentiary hearing on Mr. B.'s claim. On November 24, 2003, Judge Hann granted benefits to Mr. B.. Judge Hann declined to rule on WCF's and Fremont's relative liability for those benefits.

Fremont and WCF now request Commission review of Judge Hann's decision. Freemont does not contest Mr. B.'s right to benefits, but contends the benefits should be paid by WCF, Buehner's insurance carrier during the last period that that Mr. B. was exposed to silica dust while employed by Buehner. For its part, WCF disputes Mr. B.'s right to payment of future medical care. Alternatively, WCF argues that a medical panel should be appointed to consider the medical aspects of Mr. B.'s claim.

FINDINGS OF FACT

The Commission affirms and adopts Judge Hann's findings of fact, summarized below. The Commission augments Judge Hann's decision with additional findings regarding 1) the source and duration of Mr. B.'s exposure to silica dust and 2) WCF's insurance coverage of Buehner.

For most of the time between 1967 and 2002, Mr. B. worked for Buehner as a sandblaster. During that same period, Mr. B. occasionally held other jobs. He was in the army from 1967 to 1970, worked as a salesman from 1995 to 1999 and was self-employed between September 2000 and September 2001. Mr. B. returned to Buehner a final time during September 2001 and worked until January 11, 2002, when the company went out of business.

Mr. B. was exposed to silica dust throughout his many years working Buehner. He was not exposed to any significant silica dust from any other source. On January 22, 2002, only eleven days after his work at Buehner ended, Mr. B. underwent a lung biopsy that showed he had silicosis. Mr. B.'s silicosis was caused entirely by exposure to silica dust at Buehner.

WCF provided workers' compensation insurance coverage for Buehner from 1998 through January 2002.

DISCUSSION AND CONCLUSION OF LAW

The Commission will first address Fremont's argument that WCF, rather than Fremont, is liable for Mr. B.'s occupational disease benefits.

Fremont and WCF each provided workers' compensation coverage for Buehner during times when Mr. B. was exposed to silica dust at Buehner. However, Fremont contends that, because WCF was the insurance carrier when Mr. B. was last exposed to silica dust, liability for Mr. B.'s silicosis falls entirely to WCF by virtue of the "last injurious exposure" rule.

The last injurious exposure rule places full liability on the insurance carrier covering an employer at the time of the last injury or exposure that is causally related to the disability. See *Larson's Workers' Compensation Law*, §153.02(1). With some limitations, § 34A-3-105 of the Utah Occupational Disease Act[2] adopts the last injurious exposure rule, at least with respect to employers. The question before the Commission is whether the last injurious exposure rule should also apply to insurance carriers. On this question, the Commission sees no reason to deviate from the precedent of Pacific Employers Insurance Co. v. Industrial Commission, 157 P.2d 800 (Utah 1945).

The facts of Pacific Employers are similar to the facts of Mr. B.'s case. Mr. Deza worked as an underground miner for National Tunnel over a period of 27 years. He was diagnosed with silicosis in 1937. He continued working underground, where he was exposed to silica dust, until June 7, 1943, when National Tunnel moved him to an above-ground position that did not expose him to silica dust. Three weeks later, on July 1, 1943, National Tunnel transferred its workers' compensation insurance coverage from the State Insurance Fund to Pacific Employers Insurance Co. On March 25, 1944, Mr. Deza became disabled from his silicosis and filed an application for occupational disease benefits.

All parties conceded that Mr. Deza was entitled to occupational disease benefits, but each of the two insurance companies that had provided occupational disease insurance coverage for National Tunnel argued that the other was liable for payment of Mr. Deza's benefits. After citing § 42-1a-14 of the Utah Occupation Disease Act (corresponding to the current § 34A-3-105 of the Act), the Supreme Court concluded that the date on which Mr. Deza was last exposed to harmful quantities of silica dust "attaches the liability to the employer's insurance carrier as of that date. . ." Because the State Insurance Fund was the insurance carrier on June 7, 1943, when Mr. Deza left the underground mine and was no longer exposed to silica dust, the State Insurance Fund, rather than Pacific Employers Insurance Co., was liable for all of Mr. Deza's occupational disease benefits.

While the Commission recognizes that the formulation of the last injurious exposure rule now found in §34A-3-105 varies in some details from the version of the rule addressed in Pacific Employers, those differences are not significant under the facts of Mr. B.'s case and do not undercut the logic of the Pacific Employers holding.[3] Therefore, having determined that Mr. B.'s last injurious exposure to silica occurred at Buehner on January 11, 2002, and that WCF was Buehner's insurance carrier on that date, the Commission concludes that WCF is liable for all benefits due Mr. B. and that Fremont has no liability.[4]

Turning to WCF's motion for review, its primary argument is that WCF should have no liability for future treatment of Mr. B.'s silicosis because any such future treatment will be necessitated by his exposure to silica from sources other than his work at Buehner's. WCF's argument lacks any evidentiary basis, but is instead based on conjecture. Of course, whether WCF is required to pay future medical expenses will always depend on whether the then-available medical evidence establishes that the medical care in question is necessary to treat Mr. B.'s work-related silicosis. Subject to that clarification, the Commission finds no error in Judge Hann's award of future medical care necessary to treat Mr. B.'s work-related silicosis.

WCF also contends a medical panel should be appointed to consider various aspects of Mr. B.'s claim. WCF's argument is once again based on speculation, without reference to any statute or rule that would require appointment of a medical panel under the facts of this case. Consequently, the Commission declines to require appointment of a medical panel in this matter.

ORDER

The Commission affirms Judge Hann's award of occupational disease benefits to Mr. B.. The Commission releases Fremont from any liability for such benefits and hereby orders WCF to pay all disability compensation and medical expense due Mr. B. by virtue of Judge Hann's order. It is so ordered.

Dated this 18th day of May, 2004.

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R. Lee Ellertson
Utah Labor Commissioner

1. Silicosis is defined by Dorland's Illustrated Medical Dictionary, 27th ed., as: pneumoconiosis due to the inhalation of the dust of stone, sand, or flint containing silicon dioxide, with formation of generalized nodular fibrotic changes in both lungs.

2. Section 34A-3-105 of the Utah Occupational Disease Act sets forth Utah's version of the last injurious exposure rule as follows:

> (1) To the extent compensation is payable under this chapter for an occupational disease which arises out of and in the course of an employee's employment for more than one employer, the only employer liable shall be the employer in whose employment the employee was last injuriously exposed to the hazards of the disease if:
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> (a) the employee's exposure in the course of employment with that employer was a substantial contributing medical cause of the alleged occupational disease; and
>
> (b) the employee was employed by that employer for at least 12 consecutive months.
>
> (2) Should the conditions of Subsection (1) not be met, liability for disability,

death, and medical benefits shall be apportioned between employers based on the involved employers' causal contribution to the occupational disease.

3. The Commission also notes Professor Larson's comments regarding the continuing usefulness of the last injurious exposure rule: "This rule . . . is the majority rule in successive insurer cases, either by judicial adoption or by express statutory provisions." *Larson's Workers' Compensation Law*, §153.02(1). "The last injurious exposure rule is also utilized in occupational disease cases, including those involving . . . silicosis . . . . The . . . rule is particularly useful for allocating liability in occupational disease cases, which often involve a number of insurers." *Larson's* at §153.02(5)

4. In light of the Commission's conclusion that the last injurious exposure rule is applicable and that WCF is the only insurance carrier liable for Mr. B.'s benefits, the Commission finds it unnecessary to address Freemont's request to join other defendants.